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NOTES

THE FIRST AMENDMENT BECOMES A NUISANCE: ARCARA v. CLOUD BOOKS, INC.

The sword of public nuisance is a blunt one, admirably designed to curb noxious odors or to quell riots, but ill suited to the delicate sphere of the First Amendment where legal overkill is fatal.*

Publication and dissemination of books are forms of expression protected from governmental suppression by the first amendment.¹ Yet, it has also been long recognized that such freedoms are not absolute,² particularly when state and local governments seek to exercise their police powers through regulation to promote the public health, safety, and general welfare.³ In the exercise of its police powers, the state has the authority to abate public nuisances,⁴ so long as it does not unduly infringe upon protected indi-

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¹ See, e.g., Redrup v. New York, 386 U.S. 767, 770 (1967); Smith v. California, 361 U.S. 147, 150 (1959). In Smith, the Supreme Court emphasized that the dissemination of books under "commercial auspices" does not lessen the constitutional protections traditionally afforded booksellers and publishers under the first amendment, because retail outlets play "a most significant role in the process of the distribution of books." Id. at 150.

² See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983). Here, the Court noted that the federal government and the states "can subject newspapers to generally applicable economic regulations without creating constitutional problems." Id. at 581; see also Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969) (newspapers subject to antitrust laws); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-94 (1946) (newspapers subject to labor laws).

³ When state and local governments regulate land use, it is said that they are exercising their "police powers." This has been defined as "the power of government to regulate human conduct to protect or promote 'public health, safety or the general welfare.'" R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property § 9.2, at 517 (1984) [hereinafter R. Cunningham] (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (zoning ordinance forbidding erection of various business establishments in designated residential districts within government's police power to promote the public health, safety, and general welfare)).

⁴ A public nuisance has been defined as any activity that interferes with or "disrupt[s] the comfort and convenience of the general public by affecting some general interest." Napro Dev. Corp. v. Town of Berlin, 135 Vt. 353, 357, 376 A.2d 342, 346-47 (1977); see also Spur Indus. Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 186, 494 P.2d 700, 708 (1972) (en banc)
Upon judicial review of such regulatory measures, a balancing of interests must be undertaken, and a statute restricting first amendment freedoms will be upheld only if it is based upon a compelling state interest and reaches a subject within the state’s constitutional power to regulate.

For example, illegal uses of land involving prostitution or gambling have long been prohibited by state and local ordinances because they were deemed public nuisances. Thus, a state nuisance statute closing a massage parlor for housing illicit sexual activities may hardly be said to raise first amendment concerns, simply because no protected forms of expression are exercised on the premises. It becomes quite another matter, however, when the site of illicit sexual activities is within an establishment associated with protected forms of expression, like a bookstore, and the state moves to enforce these same nuisance powers against the owner of the premises. Under these circumstances, a state closure order would threaten the bookstore owner’s constitutionally protected right to disseminate books. In Arcara v.

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8. R. Cunningham, supra note 3, at 417.

9. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (freedom of speech cannot protect conduct in violation of a valid criminal statute, even if designed to present a point of view).

10. See generally Comment, Can An Adult Theater or Bookstore Be Abated As a Public Nuisance in California?, 10 U.S.F. L. Rev. 115, 125 (1975) (“The aim of a public nuisance action is not the suppression of an idea, but rather the abatement of a condition which causes injury to the public. Nevertheless, the granting of an injunction against a . . . bookstore is, in effect, suppression of the materials therein . . . .”).

11. In People ex rel. Van De Kamp v. American Art Enter. Inc., 75 Cal. App. 3d 523, 529-30, 142 Cal. Rptr. 338, 341-42 (1977), the California Court of Appeals refused to close down a building primarily used for publishing purposes, but which also served as a “nerve center” for prostitution. Though the court issued an injunction under California’s nuisance statute to prevent any further illegal activity on the premises, it chose not to close down the building itself because “an incidental infringement upon First Amendment rights [would be]
Cloud Books, Inc., the United States Supreme Court considered the likelihood of such a threat to these first amendment freedoms when it reviewed the constitutionality of a New York nuisance statute.

Arcara arose out of New York's effort to close an adult bookstore, operated by Cloud Books, under a nuisance statute authorizing a one-year closure of any building as a public nuisance if it was being used for prostitution and lewdness. After local enforcement officials discovered acts of public lewdness on the bookstore's premises, the state filed a civil action under the statute seeking its closure. The Trial Division of the New York Supreme Court, Special Term, denied Cloud Books' motion for partial summary judgment, and the Appellate Division, Fourth Department, affirmed. Before the New York Court of Appeals, however, Cloud Books won a reversal on first amendment grounds. The court of appeals ruled that the one-year closure order violated the first amendment because equally effective means were available to the state to restrict illicit sexual activities without unduly

'greater than [that] essential to vindicate [the government's] . . . interests.'

Id. at 531, 142 Cal. Rptr. at 342 (citation omitted).


Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance. The building, erection, or place . . . in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists . . . [is] hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided.

N.Y. PUBL. HEALTH LAW § 2320 (McKinney 1985). Section 2329 provides for the closure of any building found to be a public health nuisance under § 2320:

If the existence of the nuisance be admitted or established in an action as provided in this article . . . an order of abatement shall be entered as part of the judgment in the case, which order . . . shall direct the effectual closing of the building, erection or place against its use for any purpose, and so keeping it closed for a period of one year

Id. § 2329.

14. People ex rel. Arcara, 119 Misc. 2d at 506, 465 N.Y.S.2d at 635. The deputy sheriff working an undercover operation stated in his affidavit that he personally observed acts of masturbation, fondling, and fellatio, while he himself had been solicited at least four times to perform sexual acts in return for money. Id. at 506, 465 N.Y.S.2d at 635.

15. Id. at 512, 465 N.Y.S.2d at 638.


burdening the store owner's constitutionally protected bookselling activities.\(^\text{18}\)

In a six to three decision, the Supreme Court reversed.\(^\text{19}\) Chief Justice Burger, writing for the majority, concluded that the New York Court of Appeals erred in applying a first amendment standard of review to illicit sexual conduct which manifested absolutely no element of protected expression.\(^\text{20}\) As a result, the Court refused to allow the first amendment to be used as a shield behind which unlawful conduct could flourish.\(^\text{21}\) Justice O'Connor, in a separate concurrence, agreed with the majority's judgment, but emphasized that her decision would be entirely different if "a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books."\(^\text{22}\) Dissenting, Justice Blackmun concluded that the mandatory one-year closure placed a severe and unnecessary burden upon the first amendment rights of booksellers.\(^\text{23}\) The dissent concluded that because state officials failed to show that they had chosen the least restrictive means of pursuing their legitimate objectives, the mandatory closure requirement under the New York nuisance statute was unconstitutional as applied

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18. Id. at 337, 480 N.E.2d at 1099, 491 N.Y.S.2d at 317.
20. Arcara, 106 S. Ct. at 3177-78. In determining whether conduct is expressive or nonexpressive for purposes of first amendment protection, the Supreme Court has held that the presence of a "communicative element" is crucial. California v. LaRue, 409 U.S. 109, 117 (1972). That which is considered speech-related conduct, in which expression predominates, will receive first amendment protection. See, e.g., Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963) (peaceful demonstration on grounds of State House to protest state segregation policies ruled constitutionally protected free speech). However, conduct in which "action" dominates will not receive such protection. See, e.g., Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (labor union activities designed to publicize their secondary boycott "constituted a single and integrated course of conduct, which was in violation of... [a valid criminal statute]"). But see L. Tribe, supra note 5, § 12-7, at 601:

The distinction between "expression" and "action" or "speech" and "conduct" is essentially unhelpful because it asks a question which is answerable only if one has already decided, on independent grounds, whether the act is protected by the first amendment. The persistence of the distinction in the language of the Court may be attributable to a reluctance to concede that the first amendment has any relevance whatsoever to political assassinations, radical bank robberies, or other violent modes of expression . . . .

Id. (footnotes omitted).
22. Id. at 3178 (O'Connor, J., concurring). Justice O'Connor added that any attempt to shut down an adult bookstore because of "the perceived secondary effects of having a purveyor of such books in the neighborhood" would also constitute an improper use of a city's police powers. Id. (O'Connor, J., concurring).
23. Id. at 3178-81 (Blackmun, J., dissenting).
This Note will examine previous Supreme Court decisions that have evaluated the "operation and effect" of a state regulation upon first amendment rights. It will also review the Court's attempt to fashion a coherent legal standard which would apply to state regulations affecting conduct containing elements of speech and nonspeech, emphasizing specific state interests which have been held sufficient by the Court to justify an infringement upon protected first amendment expression. Further analysis will focus upon the Court's decision in Arcara v. Cloud Books, Inc., highlighting the court's debate over which circumstances properly trigger first amendment scrutiny of a challenged statute. Finally, this Note will conclude that the Court's failure to apply first amendment analysis in Arcara was a retreat from its previously articulated willingness to examine the effects of indirect restrictions on first amendment expression.


A nuisance statute, like any other state regulation, is a means by which government seeks to achieve some legitimate end, generally to promote public health and welfare, or to preserve the character of the community. In the exercise of its police powers, however, the state may not substantially impair first amendment freedoms. The state, therefore, must choose a statutory means that is valid on its face and constitutional in its application. In general, a statute valid on its face, yet challenged as adversely affecting first amendment rights, is analyzed under the constitutional principles outlined by the Supreme Court in Near v. Minnesota. Under these principles, a statute's purposes are scrutinized, as well as its "operation and effect". In Near, the Supreme Court struck down a Minnesota nuisance statute which permitted the state to abate and enjoin any newspaper or other publication that published malicious, scandalous, or defamatory materials.

24. Id. at 3180 (Blackmun, J., dissenting).
27. See L. Tribe, supra note 5, § 12-2, at 580-84.
29. Id. at 708. For a review of early Supreme Court decisions establishing the operation and effect analysis, see Bailey v. Alabama, 219 U.S. 219, 244 (1911) ("[w]hat the State may not do directly it may not do indirectly"); Henderson v. Mayor of New York, 92 U.S. 259, 268 (1876) ("[i]n whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect").
30. 283 U.S. at 722-23. The statute at issue only permitted a defendant the defense that
When Near's newspaper published several articles with strong anti-Semitic overtones critical of local officials, a Minnesota court issued a permanent injunction forbidding further operation of his newspaper. After reviewing the purposes behind the statute, the Supreme Court ruled that its operation and effect resulted in an unconstitutional prior restraint upon the press which was tantamount to censorship. In the Court's view, proper redress for false and malicious accusations made against one's person could be found under libel laws, not in attempts to restrain the publication of newspapers themselves.

"truth was published with good motives and for justifiable ends." \textit{Id.} at 702. The Court criticized this aspect of the statute as granting the legislature too much power over the fate of constitutionally protected freedoms of the press. \textit{Id.} at 721. According to the court, "[i]f this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain speech accordingly. And it would be but a step to a complete system of censorship." \textit{Id.}

31. \textit{Id.} at 704. The articles charged in substance "that a Jewish gangster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law enforcement officers and agencies were not energetically performing their duties." \textit{Id.} Specifically, charges were directed at the Chief of Police for gross neglect of duty, illicit association with gangsters, and accepting bribes. The County Attorney was accused of failing to take appropriate measures to combat the known criminal activity, and the Mayor was accused of inefficiency and dereliction of duty. \textit{Id.}

32. \textit{Id.} at 706.

33. \textit{Id.} at 709-10. The stated purpose of the statute was to shut down newspapers or periodicals that levelled "malicious" charges of corruption against public officials or made defamatory statements against private citizens. \textit{Id.} at 709. Such published materials were declared "detrimental to public morals and to the general welfare." \textit{Id.}

34. \textit{Id.} at 713. The Court stated that the concept of prior restraint has its origins in the English licensing system, abolished in 1695, under which nothing could be published without prior approval of the church or state authorities. \textit{Id.} at 713-14. In \textit{Near}, the Court condemned such a practice, stating that "liberty of the press . . . has meant, principally although not exclusively, immunity from previous restraints or censorship." \textit{Id.} at 716. In later decisions, the Supreme Court has repeatedly regarded prior restraints upon the press as a serious infringement upon first amendment freedoms. As the Court noted in Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." \textit{See} Southeastern Promotions v. Conrad, 420 U.S. 546, 559 (1975) ("a free society [such as ours] prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand" (emphasis in original)).

35. \textit{Near}, 283 U.S. at 713. In the Court's view, "the operation and effect of the statute" unnecessarily burdened newspapers' and periodicals' right to free expression prior to the communication itself and therefore constituted a serious infringement upon their first amendment freedoms. \textit{Id.} The Court rejected Minnesota's contention that the statute was not aimed at publications per se but with the "business" of publishing defamation, because "[c]haracterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." \textit{Id.} at 720.

36. \textit{Id.} at 718-19. Cases such as Secretary of State of Maryland v. Munson Co., 467 U.S. 947, 964 n.12 (1984), underscore the fact that prior restraints or other restrictions on first amendment rights may be present not only where a statute directly prohibits expression, as in \textit{Near}, but also where the impact of the statute indirectly curtails the exercise of these rights.
An analogous application of Near's "operation and effect" analysis in the area of obscenity law is exemplified by Freedman v. Maryland. Freedman was convicted for exhibiting a motion picture without first submitting it to the Maryland State Board of Censors for prior approval. The statute, which prohibited the distribution and exhibition of obscene movies, came under careful scrutiny by the Supreme Court to determine if its application had unduly burdened protected forms of expression. Relying upon its recently developed definition of obscenity, the Supreme Court held that, before movies could be banned, the issue of obscenity would have to be prop-

In Munson, the Supreme Court struck down a Maryland statute that prohibited charitable organizations, "in connection with any fundraising activity, from paying or agreeing to pay as expenses more than 25% of the amount raised." This statute particularly hurt charitable organizations whose solicitation costs were high because they disseminated information that included viewpoints on public issues as part of their fundraising activities. Though the Maryland Secretary of State had authority to waive the 25% limitation, the Court viewed this remedy as ineffective in safeguarding fundamental first amendment freedoms because "charities whose First Amendment rights are abridged by the fundraising limitation simply would have traded a direct prohibition on their activity for an indirect licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State." The Supreme Court thereby concluded that "risk of delay was built into the Maryland procedure." The state conceded that Freedman's film "Revenge at Daybreak" did not violate its statutory standards and would have received a license if it had been properly submitted.

Under the statute that Freedman violated, the exhibitor of a film must submit his film to the Maryland Board for approval, although no time limit was imposed for completion of its action. If the film was disapproved for showing, the exhibitor could pursue several appeals, although no judicial participation in review of such materials was mandated. The Supreme Court thereby concluded that "risk of delay was built into the Maryland procedure." In Smith v. California, the Court held that a state may not impose absolute criminal liability on a bookseller for the mere possession of obscene materials and stressed that the state's power to prevent its distribution did not mean that there were no constitutional barriers to the practical exercise of that power. See supra note 1 and accompanying text.

In Roth v. United States, the Court held that obscenity was not within the area of constitutionally protected speech or press. In Miller v. California, the Court enunciated the standard to determine obscenity. According to Miller, to decide what materials are obscene, the trier of fact must consider:

whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

erly adjudicated in a timely manner.\textsuperscript{42}

The Supreme Court held the submission procedure to be an invalid prior restraint because Maryland had failed to adopt adequate safeguards to prevent undue restraints upon free speech.\textsuperscript{43} The Court ruled that only those statutes containing adequate procedural safeguards against unnecessary censorship could withstand constitutional attack under Near's prior restraint doctrine.\textsuperscript{44}

In \textit{Freedman}, the state sought to promote a legitimate end: preventing the spread of obscene movies. Yet the means chosen, a state board of censors, had the effect of unduly inhibiting the exhibition of constitutionally protected films as well.\textsuperscript{45} Therefore, the Court determined that state efforts to reach such illegal activity must be pursued by more narrowly tailored means.\textsuperscript{46} Though \textit{Freedman} involved a statute aimed predominantly at restricting content (obscene movies), as opposed to conduct, the Court's decision nevertheless reflected a continued adherence to the Near principle that a statute's validity rests in large part upon the practical effects of its application.

Similarly, in \textit{Schneider v. State},\textsuperscript{47} the United States Supreme Court considered the issue whether a local township could combat litter by prohibiting

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\item \textsuperscript{42} \textit{Freedman}, 380 U.S. at 58-59. Though the \textit{Freedman} Court addressed state regulation of films, it relied upon principles previously articulated in cases involving state efforts to ban allegedly obscene books. \textit{Id.} at 58 (citing \textit{A Quantity of Books v. Kansas}, 378 U.S. 205 (1964); \textit{Bantam Books, Inc. v. Sullivan}, 372 U.S. 58 (1963); \textit{Manuel Enter., Inc. v. Day}, 370 U.S. 478 (1962); \textit{Marcus v. Search Warrant}, 367 U.S. 717 (1961)). The Court observed that "[t]he teaching of [these] cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." \textit{Id.} (citations omitted).
\item \textsuperscript{43} \textit{Freedman}, 380 U.S. at 59-60; see also \textit{Vance v. Universal Amusement Co.}, 445 U.S. 308, 315 (1980) ("the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance").
\item \textsuperscript{44} \textit{Freedman}, 380 U.S. at 58. The Court established three procedural safeguards to be adhered to by any noncriminal process requiring the prior submission of films to a censor. \textit{See id.} at 58-59. First, a censor must bear the burden of proof that the film in question is unprotected by the first amendment. \textit{Id.} at 58. Second, an adversarial, prompt, and final adjudication on the issue of obscenity must be assured. \textit{Id.} Third, any prior restraint before judicial review must be strictly limited in duration. \textit{Id.} at 58-59. "Without these safeguards," the Court observed, "it may prove too burdensome to seek review of the censor's determination. . . . The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation." \textit{Id.} at 59.
\item \textsuperscript{45} \textit{Id.} at 59-60.
\item \textsuperscript{46} \textit{Id.} at 58. In effect, the Court condoned a limited form of prior restraint upon the exhibition of potentially obscene movies, provided that Maryland adopted constitutionally protected procedures to prevent unnecessary infringements upon legitimate forms of expression. \textit{Id.} at 58-59.
\item \textsuperscript{47} 308 U.S. 147 (1939).
\end{itemize}
the distribution of leaflets on city streets without a permit.\textsuperscript{48} Reiterating \textit{Near}'s emphasis on testing the effect of a challenged statute, the Supreme Court held that such regulations were an unconstitutional form of censorship, because they unduly inhibited the free flow of information and opinion guaranteed under the first amendment.\textsuperscript{49} The need to keep streets clean was deemed an insufficient reason to justify ordinances which effectively prohibited persons rightfully on a public street from handing literature to those willing to receive it.\textsuperscript{50} Instead, the Court suggested that a more acceptable means of combating litter would be to punish those who actually threw such leaflets on the streets.\textsuperscript{51}

As \textit{Near} and \textit{Schneider} make clear, the validity of a regulation that infringes upon first amendment rights will be measured not only by the stated goals and language of a statute but also by its actual application and effect upon those it reaches. At some point, an incidental burden upon fundamental rights becomes one which significantly restricts them. When faced with a regulation that alleges to place such a burden upon first amendment interests, the Court will weigh the effect of the regulation on such freedoms against the state's interests promoted by its application. As such, in \textit{Schneider}, the state's interest in keeping streets clean and preventing litter could not override the severe restrictions placed upon the first amendment rights of individuals wishing to disseminate leaflets on public streets. Finally, as demonstrated by the Court's ruling in \textit{Freedman}, limited restraints on first amendment rights may be condoned where legitimate state interests are promoted, such as preventing the spread of obscene materials or maintaining community health standards, provided that constitutionally acceptable procedural safeguards are in place.\textsuperscript{52}

It must be remembered, however, that not all regulations adversely affecting first amendment rights are aimed at the content of specific materials, as was the case in \textit{Near} (libelous publications) and \textit{Freedman} (obscene mov-

\textsuperscript{48} \textit{Id.} at 154-59.

\textsuperscript{49} \textit{Id.} at 163-64; \textit{see also} \textit{Lovell v. City of Griffin}, 303 U.S. 444, 451 (1938) (Court voided an ordinance which forbade distribution of literature of any kind without written permit from city manager).

\textsuperscript{50} \textit{Schneider}, 308 U.S. at 162. While a ban on the distribution of leaflets on city streets might be the most efficient way to combat litter, the Court stated that "considerations of this sort do not empower a municipality to abridge freedom of speech and press." \textit{Id.} at 164. In dicta, however, the Court emphasized that such freedom was not absolute. \textit{Id.} at 160. For example, a person could not exercise this liberty by lying down in the middle of a crowded street, contrary to traffic regulations, and block traffic; nor could pamphleteers block innocent pedestrians' right of way on the street until they accepted a tendered leaflet. \textit{Id.}

\textsuperscript{51} \textit{Id.} at 160-61.

\textsuperscript{52} \textit{See supra} notes 39-44 and accompanying text.
Often a state regulation, like a nuisance statute, will be aimed at abating and preventing the recurrence of illegal conduct wherever it is found because it poses a threat to the public health, safety, and welfare. When illegal activity arguably contains elements of expression, however, the question then becomes one of determining when, and to what extent, such conduct should be afforded first amendment protection. Thus, judicial review in this context becomes two-fold. The Court will look at the overall effect of a statute upon protected forms of expression, and will also examine the conduct itself. Whether the Court categorizes the conduct at issue as expressive, nonexpressive, or both, becomes critical because a challenged statute cannot be said to infringe first amendment freedoms if such conduct lacks significant elements of protected expression.

II. The O'Brien Test: Weighing the Effect of Government Regulation Upon Conduct Containing Speech and Nonspeech

Expanding upon the operations and effect analysis of Near and its progeny, the Supreme Court in United States v. O'Brien was concerned primarily with formulating legal criteria to determine whether a government regulation aimed at nonexpressive conduct had an adverse or merely incidental effect upon first amendment rights. Put another way, the Court attempted to determine the point at which the restraint of a government regulation upon first amendment rights was so remote that the state's interests promoted by the statute easily outweighed any perceived threat to protected forms of expression.

O'Brien was convicted for violating section 462(b) of the Universal Military Training and Service Act of 1948 because he burned his draft card in

54. See supra note 4 and accompanying text.
55. See generally L. Tribe, supra note 5, § 12-7, at 598-601.
57. See, e.g., California v. LaRue, 409 U.S. 109, 118 (1972) (statute prohibiting bars and nightclubs from displaying movies or live entertainment containing certain acts of sexual conduct did not violate first amendment because such "performances" partook more of gross sexuality than of communication); see also supra note 20.
59. Id. at 367-77.
60. Id.
61. As amended by Congress in 1965, § 462(b) deemed an offender any person who
public to protest the Vietnam War. The Court characterized O'Brien's behavior as manifesting elements of both speech and conduct, stating that a sufficiently important governmental interest in regulating the nonexpressive aspect of his action (burning the draft card) could well justify any incidental burden on the speech element. Under what has become known as the "O'Brien test," the Court held that the state may legitimately regulate nonexpressive conduct even if it adversely affects a protected element of speech contained in the same course of conduct, provided that four criteria are satisfied. First, the regulation must be a constitutional exercise of the government's power. Second, it must further a compelling state interest. Third, the regulation must bear no relation to the suppression of expression. Fourth, any incidental burden upon first amendment rights which results from the application of the regulation must be no greater than necessary to promote the compelling state interest.

The Court concluded that the statutory amendment outlawing the destruction of draft cards met the first element of the test because it was within the constitutional power of the federal government to enact laws necessary to promote military preparedness. The second prong was met because draft certificates advanced the government's interest in a smoothly functioning Selective Service System. Because the Court was satisfied that this interest in administrative efficiency bore no relation to the suppression of speech, the regulation satisfied the third element of the test. Finally, be-

"forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such [selective service registration] certificate." 50 U.S.C. app. § 462(b)(3) (1982).

62. O'Brien, 391 U.S. at 376. O'Brien alleged that the act of burning his draft card was protected "symbolic speech" within the first amendment and, in effect, encompassed the "communication of ideas by conduct." Id. Rejecting this presumption, the Court stated: "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Id. But cf. Spence v. Washington, 418 U.S. 405, 409-11 (1974) (per curiam) (alteration of United States flag in violation of statute held a constitutionally protected form of symbolic speech). See generally Nimmer, The Meaning of Symbolic Speech Under the First Amendment, 21 UCLA L. REV. 29 (1973); Note, Symbolic Conduct, 68 COLUM. L. REV. 1091 (1968).

63. Id. at 376-77.

64. 391 U.S. at 377.

65. Id. at 377.

66. Id.

67. Id.

68. Id.

69. Id. For support of the proposition that the constitutional power of Congress to raise and support armies is broad and sweeping, see Lichter v. United States, 334 U.S. 742, 755-58 (1948); Selective Draft Law Cases, 245 U.S. 366, 368-70 (1918).

70. O'Brien, 391 U.S. at 381.

71. Id. at 381-82. O'Brien alleged that the purpose behind § 462(b)(3) was to suppress freedom of speech, particularly the speech of those protesting the Vietnam War, and was, therefore, unconstitutional. Id. at 382-83. The Court rejected this argument, stating that it
cause the statute was sufficiently limited to the noncommunicative aspect of O'Brien's conduct, the act of burning his draft card, and sought only to en-
sure the promotion of a legitimate governmental interest, the fourth prong
was met as well.72 As a result, the Court upheld the validity of O'Brien's
conviction under the statute.73

An important aspect of the O'Brien test was its requirement that a regula-
tion not place any greater burden on first amendment freedoms than neces-
sary to promote a compelling state interest. The Court's use of such
language represented an incorporation of "least restrictive means" principles
into its analysis, a first amendment doctrine perhaps best illustrated by the
Supreme Court case of Shelton v. Tucker.74 In Shelton, Arkansas teachers
were required by statute to file an affidavit each year detailing all the organi-
izations to which they belonged or to which they had contributed in the past
five years.75 Shelton's teaching contract was not renewed because he refused
to file such an affidavit.76 While recognizing Arkansas' legitimate interest in
assuring the competency and fitness of its teachers, the Supreme Court nev-
evertheless struck down the statute because it had unnecessarily and indiscrimi-
ately infringed upon Shelton's protected associational freedoms under the
first amendment.77 In the Court's view, requiring a teacher to list every con-
ceivable associational tie, whether professional, political, avocational, or reli-
gious, had little, if any, bearing upon his occupational competence or
fitness.78 The Court held that, in promoting its legitimate interests, Arkan-

72. Id.

73. Id. at 382. But see Stromberg v. California, 283 U.S. 359, 361 (1931), in which the
Supreme Court considered a statute that prohibited people from expressing their opposition to
organized government by displaying "any flag, badge, banner, or device." The Court ruled
that such a measure was aimed at suppressing communication and, therefore, could not be
upheld as a valid regulation of noncommunicative conduct. Id. at 368-70.

74. 364 U.S. 479 (1960). As Shelton makes abundantly clear, even if the purpose behind a
regulation is legitimate and substantial, "it cannot be pursued by means that broadly stifle
fundamental personal liberties when the end can be more narrowly achieved. The breadth of
legislative abridgment must be viewed in the light of less drastic means for achieving the same
basic purpose." Id. at 488 (footnotes omitted). See generally Note, Less Drastic Means and

75. Shelton, 364 U.S. at 480-81. The record at trial revealed that petitioner Shelton was
not a member of the Communist Party, nor was he a member of any organization advocating
the overthrow by force of the United States Government. Id. at 483. He was, however, a
member of the NAACP. Id.

76. Id.

77. Id. at 490. The Court expressed concern over the fact that the information filed under
the statute was not confidential, thereby creating a risk of public disclosure and antagonizing
superiors by belonging to unpopular groups. Id. at 486.

78. Id. at 488.
sas would have to use means which were, unlike those imposed on Shelton, the least restrictive of speech possible.  

A. The Absence of a Substantial State Interest

The Supreme Court has applied the O'Brien test, or a substantially similar analysis, in reviewing zoning ordinances which had purposes other than suppressing protected speech, but which nevertheless had incidental effects on speech. As a result, the Court has weighed the state's justifications for the regulation at issue against the burden imposed upon first amendment freedoms.

In Schad v. Borough of Mount Ephraim, the Court struck down a zoning ordinance prohibiting all live entertainment—including nude dancing—in specific commercial areas. The Court concluded that zoning ordinances, like any other ordinance, have to be narrowly drawn and further a substantial state interest to justify an infringement upon first amendment rights.

79. Id. at 488-90; see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770-71 (1976) (although state has a legitimate interest in promoting professional standard in pharmaceutical industry, it must use less drastic means than a complete ban on the advertisement of prescription drug prices).

80. See, e.g., Young v. American Mini Theatres, 427 U.S. 50, 71-73 (1976) (where the Supreme Court upheld a Detroit zoning law which had dispersed, but not totally banned, nonobscene adult movies). In this plurality opinion, Justice Powell concurred on the basis of O'Brien, stating “[t]he inquiry for First Amendment purposes is not concerned with [the] economic impact [of the zoning ordinance]; rather, it looks only to the effect of this ordinance upon freedom of expression.” Id. at 78 (Powell, J., concurring).

81. Id. at 61 (1981).

82. Id. at 65. The Court stressed early in its opinion that an entertainment program featuring nudity would not necessarily put it beyond first amendment protections. Id. at 66; see also Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (occasional scenes of nudity in movie “Carnal Knowledge” held insufficient grounds to prosecute exhibitor of film because “nudity alone is not enough to make material legally obscene under the Miller standards”).

83. Schad, 452 U.S. at 68; see, e.g., Moore v. East Cleveland, 431 U.S. 494, 505-06 (1977) (the Court struck down a zoning ordinance which limited the occupancy of dwellings to a single family). By its definition of “family,” the ordinance at issue in Moore prevented certain relatives from living together and, as a result, the Court held that it impermissibly infringed
In the Court's view, the borough failed to advance a compelling interest that
could justify excluding all live entertainment while permitting a variety of
other commercial uses in the restricted zones. Problems associated with
live entertainment, such as parking, trash, and police protection were found
to be an insufficient state interest, particularly since other permitted com-
cmercial activities in the borough produced the same problems. Moreover,
the Court reasoned that a total ban on live entertainment precluded any
alternative channels of communication for such protected expression in the
borough. In the Court's view, it was insufficient for Mount Ephraim officials to contend that such entertainment was amply available in neighboring
towns; such alternatives must also exist within the borough itself.

*Schad* reflected the Court's continued adherence to the *Near* principle of
examining an ordinance by its operation and effect. Here, the operation of
Mount Ephraim's land-use ordinance had the effect of infringing upon pro-
tected first amendment freedoms. Equally important to the Court's analysis in
*Schad* was its rejection of the compelling interests advanced by Mount Ephraim to justify the restrictions placed upon free speech. Such scrutiny by
the Court was consistent with the constitutional values previously articu-
lated in *O'Brien*'s four-part test.

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Reve-

upon protected liberty interests. *Id.* at 499-500; cf. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1974) (zoning ordinance restricting use of land to one-family dwellings upheld because it affected only unrelated persons).

84. *Schad*, 452 U.S. at 74-75. In a specific reference to *O'Brien*, the Court also added that
"[e]ven where a challenged regulation restricts freedom of expression only incidentally or only
in a small number of cases, we have scrutinized the governmental interest furthered by the
regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary
intrusion on freedom of expression." *Id.* at 69 n.7 (citing United States v. *O'Brien*, 391 U.S.
367, 376-77 (1968)).

85. *Id.* at 73.

86. *Id.* at 75-76. By precluding live entertainment from the borough, Mount Ephraim's
zoning regulation fell beyond the reach of *American Mini Theatres' holding and, instead, ran
headlong into its dicta, which had warned "[t]he situation would be quite different if the ordi-
nance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S.
50, 71 n.35 (1976); see also *Schad*, 452 U.S. at 78 (Blackmun, J., concurring), where Justice
Blackmun noted:

It would be a substantial step beyond *Mini Theatres* to conclude that a town or
county may legislatively prevent its citizens from engaging in or having access to
forms of protected expression that are incompatible with its majority's conception of
the 'decent life' solely because these activities are sufficiently available in other
locales.

*Id.* (Blackmun, J., concurring).

87. *Schad*, 452 U.S. at 76. The Court relied in part upon the principle stated in *Schneider*,
308 U.S. 147, 163 (1939), that "one is not to have the exercise of his liberty of expression in
appropriate places abridged on the plea that it may be exercised in some other place."
The Court applied the *O'Brien* analysis to a regulation aimed exclusively at nonexpressive conduct yet found to impose a disproportionate burden upon those engaged in first amendment activity. Minnesota had placed a tax upon the use of large quantities of newsprint and ink, products used primarily in the newspaper and periodical businesses. The Supreme Court found that the tax violated the first amendment because newspapers were effectively singled out to shoulder the fiscal burden, and Minnesota failed to articulate a sufficiently important state interest to justify such disparate treatment. Though never specifically applying the *O'Brien* test, the Court's analysis in *Minneapolis Star* invoked its spirit. First, the Court agreed with Minnesota that it was within the state's constitutional powers to impose a generally applicable economic regulation upon the press. Next, the majority considered whether Minnesota had advanced a sufficiently important governmental interest to justify the burden that had been placed upon the press. The Court concluded that Minnesota's interest in raising revenue, in and of itself, could not justify such an effect upon the press.

89. Id.
90. Often referred to as a "use tax," this fiscal measure was designed to protect a state's sales tax by eliminating its residents' incentive to travel to states with lower sales taxes to buy goods rather than buying them in their own state. Id. at 577. In 1974, the Minnesota Legislature amended the use tax applied to publications by exempting the first $100,000 worth of ink and paper consumed in a calendar year, thereby giving each publication a tax credit of $4000 per year. Id. at 577-78. The resulting effect was that only a few publications each year wound up paying any tax. For example, in 1974, 388 newspapers were eligible for taxation under the regulation. Id. at 578. The Minneapolis Star & Tribune, however, was one of 11 newspapers upon whom taxes were imposed. Id. The Minneapolis Star & Tribune paid roughly two-thirds of the total tax revenue collected by the state. Id.
91. Id. at 592-93.
92. Id. at 586-90. The Court noted that Minnesota's treatment of publications differed from that of other businesses in two ways. First, it imposed a use tax that didn't serve the function of protecting its sales tax. Id. at 581. Second, it taxed an intermediate transaction rather than the final retail sale. Id. In the Court's view, singling out the press for such a burdensome tax now would open the door to similar attempts in the future, thereby reducing the Minnesota legislature's incentive to consider taxes of general applicability. Id. at 585. "That threat," the Court observed, "can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." Id.
93. Id. at 581; see also United States v. *O'Brien*, 391 U.S. 367, 377 (1968) (first part of *O'Brien* test—"a government regulation is sufficiently justified if it is within the constitutional power of the Government").
94. *Minneapolis Star*, 460 U.S. at 586-90; see also *O'Brien*, 391 U.S. at 377 (second part of *O'Brien* test—"a government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest"). For a later case upholding this *O'Brien* principle, see United States v. *Lee*, 455 U.S. 252, 259-60 (1982) (tax which burdens rights protected by the first amendment cannot stand unless it is necessary to achieve an overriding governmental interest).
because alternative means of taxing businesses generally were available. The Court also noted that regulations subjecting the press to differential treatment traditionally had raised concerns regarding the motivations behind such measures. As a result, the Court refused to recognize an inherent power in the state to single out the press for such disproportionate tax action because it presented too great an opportunity for abuse in the form of censorship.

_Schad_ and _Minneapolis Star_ pinpoint two important factors likely to trigger the Court's application of _O'Brien_ analysis. First, _O'Brien_ is more likely to be applied where a statute regulates conduct with an expressive element. In _Schad_, protected forms of expression, such as nude dancing, were unduly burdened by a zoning ordinance that sought to ban all live entertainment from certain commercial areas. Second, even if a statute's purpose is unrelated to the suppression of speech, the _O'Brien_ analysis may still be invoked if speech is adversely affected in the process. In _Minneapolis Star_, a tax exclusively aimed at nonexpressive conduct—publication production activities—was invalidated because its fiscal burden exclusively fell upon the press. In each case, the Court applied _O'Brien_-related principles to determine whether the regulated conduct contained an expressive element and whether the statute at issue adversely affected speech.

### B. The Evolving Speech-Conduct Dichotomy

Recent applications of _O'Brien_ continue to focus upon government regulations that restrict conduct with both an expressive and nonexpressive element. In _Clark v. Community for Creative Nonviolence_, demonstrators involved in an around-the-clock rally on The Mall and in Lafayette Park in the District of Columbia to protest the plight of the homeless brought suit

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95. _Minneapolis Star_, 460 U.S. at 586-87; see also _O'Brien_, 391 U.S. at 377 (fourth part of _O'Brien_ test—"a government regulation is sufficiently justified if . . . the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of . . . [the governmental] interest"). In dicta, the Court suggested that Minnesota's efforts to raise revenue could have been just as easily accomplished by "taxing businesses generally, [thereby] avoiding the censorial threat implicit in a tax that singles out the press." _Minneapolis Star_, 460 U.S. at 586 (footnote omitted).

96. _Minneapolis Star_, 460 U.S. at 585; see also _O'Brien_, 391 U.S. at 377 (third part of _O'Brien_ test—"a government regulation is sufficiently justified . . . if the governmental interest is unrelated to the suppression of free expression"). Though not wishing to question the legislative motives behind Minnesota's use tax against the press, the Court did pointedly observe that "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression." _Minneapolis Star_, 460 U.S. at 585.

97. _Minneapolis Star_, 460 U.S. at 592-93.


challenging a National Park Service regulation prohibiting overnight sleeping or camping in public parks. Though recognizing, arguendo, that sleep in this case was a form of expressive conduct, the Court nevertheless refused to strike down the Park Service regulation on first amendment grounds, viewing it instead as a content neutral means of promoting the government’s legitimate interest in preserving its parks. The majority explained that a reasonable time, place, and manner restriction on speech is not invalidated merely because ordinarily nonexpressive conduct (sleep) suddenly acquires expressive elements. More importantly, the Court noted that the Park Service’s prohibition against overnight sleeping did not prevent the demonstrators from communicating their message on behalf of the homeless through alternative means. Symbolic tent cities and signs were left intact by the Park Service and demonstrators had ample access to the news media. In addition, the regulation narrowly focused on the government’s substantial interest in maintaining its parks in an attractive and accessible condition without evidencing any intent to suppress speech.

In United States v. Albertini, the Supreme Court stressed that the O’Brien analysis would not invalidate a content-neutral regulation restricting

100. Id. at 290. Under the regulations applicable in Clark, camping in National Parks was permitted only on campgrounds that were specifically designated for such purposes. Id. (citing 36 C.F.R. § 50.27(a) (1983)). Lafayette Park and The Mall were not designated for such purposes. Id.

101. Id. at 293. In a concurring opinion, Chief Justice Burger strongly opposed such an assumption. Id. (Burger, C.J., concurring). He argued that the attempts at camping in the park constituted a form of “picketing” and therefore was conduct, not speech, in violation of valid National Park Service regulation. Id. (Burger, C.J., concurring).

For an earlier example of the Court’s reluctance to extend first amendment protections to illegal noncommunicative conduct containing an “artificial” element of expression, see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973) (conduct or depictions of conduct that a state legitimately could prohibit in public would receive no greater protection by moving indoors to a theatre, any more than “a man and woman locked in sexual embrace at high noon in Times Square [would be] protected by the Constitution because they simultaneously engage[d] in a valid political dialogue”).


103. Clark, 468 U.S. at 296-98.

104. Id. at 295.

105. Id.

106. Id. at 296. Implicit in the Court’s reasoning was a fear that if they were to allow an overnight camping demonstration in this case, the Park Service would thereafter be inundated with similar requests for permits by other groups demanding the right to assert their message. Id. at 297. Such a scenario, in the Court’s view, would threaten the federal government’s ability to protect and maintain the parks “in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence.” Id. at 296.

expressive conduct so long as it "promote[d] a substantial governmental interest that would be achieved less effectively absent the regulation." 108 The statute at issue in Albertini made it unlawful to reenter a military base after having received a commanding officer's official notice not to do so.109 Albertini was convicted of violating this prohibition after he reentered Hickam Air Force Base during its annual open house day to join friends participating in a peaceful demonstration.110 The Court, reaffirming Clark, upheld the validity of the statute, and determined that the first amendment would not bar application of a content-neutral regulation that incidentally burdened speech merely because a party contended that granting an exception in their case would not threaten important governmental interests.111 For purposes of O'Brien, the Court was satisfied that the government's legitimate interest in preserving security at its military bases could not be furthered as effectively through less drastic means.112

In considering the implications of the above mentioned cases, several common threads of first amendment analysis emerge. As Near evidenced, the operation and effect of a statute challenged on first amendment grounds will be carefully assessed.113 If the threat of prior restraint or censorship is revealed, as in Freedman, the Court will be strongly compelled to invalidate the statute at issue, absent some state showing of adequate procedural safeguards to protect legitimate forms of expression.114 Another important con-

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108. Id. at 688-89. Rejecting the least restrictive means implications of part four of the O'Brien test, the Court stated that a regulation would not be invalidated "simply because there is some imaginable alternative that might be less burdensome on speech." Id. at 699 (footnotes omitted). For a discussion of O'Brien and the tradeoffs inherent in attempting to fashion less restrictive means to regulate speech, see Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1485 (1975) ("[i]n virtually every case involving real legislation, a more perfect fit involves some added cost") (footnotes omitted).


110. Id. at 678. Albertini's friends were protesting the nuclear arms race; they gathered in front of a B-52 bomber and displayed a banner proclaiming "Carnival of Death" and then they proceeded to pass out leaflets while Albertini took pictures of the displays. Id.


112. Albertini, 472 U.S. at 688. The Court reached the very same conclusion in Clark, 468 U.S. at 297, when it observed "if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment."

113. See supra notes 33-35 and accompanying text (discussing Near v. Minnesota, 283 U.S. 697 (1931)); see also Albertini, 472 U.S. at 688-89 ("[r]egulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their general effect").

First Amendment

Consideration in the eyes of the Court will be the state interest put forth to justify a regulation that infringes upon first amendment rights. In *O'Brien*, the government's asserted interest in national defense was held sufficiently compelling to justify the burden its regulation placed upon those who wished to engage in forms of symbolic speech.\(^{115}\) In *Schneider*, however, the Court held that the state's interest in preventing litter was not sufficiently substantial to justify the detrimental effect its anti-litter ordinance had on an individual's right to disseminate leaflets to those willing to receive them.\(^{116}\) Ultimately, the Court will weigh the effects of a regulation on free speech against the state interests promoted by the regulation. Finally, as *Clark* and *Albertini* suggest, the Court will no longer move so swiftly, as it did in *Shelton*, to strike down an otherwise valid statute merely because a hypothetical less restrictive means is asserted to accomplish the same end sought by the regulation.\(^{117}\)

### III. The First Amendment Meets Nuisance Law

The regulation at issue in *Arcara* was a New York Public Health Law designed to abate as a public health nuisance any and all premises involved in prostitution, lewdness, or assignation.\(^{118}\) When an undercover investigation by the Erie County Sheriff's Department discovered various illicit sexual activities\(^{119}\) occurring on the premises of the Village Books and News Store,\(^{120}\) the district attorney's office brought a civil action seeking its closure.\(^{121}\) In answer to the complaint filed against it, Cloud Books, the operator of the premises, denied the Sheriff's Department's allegations that such sexual activity took place with its knowledge\(^{122}\) and moved for partial summar-

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115. See supra notes 69-70 and accompanying text.
116. See supra note 50 and accompanying text.
117. See supra note 108 and accompanying text.
119. People ex rel. *Arcara*, 119 Misc. 2d at 506, 465 N.Y.S.2d at 635; see also supra note 14 and accompanying text.
120. The Village Books and News, operated by Cloud Books, Inc., sold sexually explicit books and magazines while also providing booths for the viewing of sexually explicit movies. People ex rel. *Arcara*, 119 Misc. 2d at 506, 465 N.Y.S.2d at 635. It is important to note that at all levels of judicial review of this case, obscenity was not at issue.
121. Id., 465 N.Y.S.2d at 635.
122. Id. at 507, 465 N.Y.S.2d at 635. This crucial point of contention was never resolved conclusively at any level of the proceedings. In his sworn affidavit, the deputy sheriff who observed the illicit sexual conduct on the premises stated that he approached bookstore employees about this activity but was told by them that they were not concerned with such behav-
mary judgment on first amendment grounds arguing that closure of its bookstore would amount to a prior restraint of protected materials.123 The Trial Division of the New York Supreme Court, Special Term, denied the motion for partial summary judgment, holding that it would not permit the constitutional protections normally accorded bookselling activities to be employed as "a curtain behind which illegal activity could be freely encouraged and conducted."124

The Appellate Division, Fourth Department, affirmed, finding the unlawful sexual activities lacked any expressive element that could possibly warrant first amendment protection.125 Before the New York Court of Appeals, Cloud Books won a reversal of the closure order on first amendment grounds.126 The New York Court of Appeals determined that the four-part O'Brien test was the required standard of review to measure the impact of the closure order upon Cloud Book's bookselling activities.127 In so doing, the court of appeals concluded that an order closing the premises for a year
was much broader than necessary to achieve the state's restriction against illicit sexual conduct.\textsuperscript{128}

In a six to three decision, the Supreme Court reversed.\textsuperscript{129} Writing for the majority, Chief Justice Burger held that the first amendment did not bar enforcement of New York's nuisance statute against Cloud Books.\textsuperscript{130} The Chief Justice found that the New York legislature properly sought to protect the environment of the community at large by directing its closure sanctions at premises used for lawless activities.\textsuperscript{131}

As for the first amendment claims raised by Cloud Books, the majority held that the New York Court of Appeals misread \textit{O'Brien}.\textsuperscript{132} The Court determined that \textit{O'Brien} was irrelevant to a statute directed at imposing punishment on nonexpressive activity.\textsuperscript{133} The majority reasoned that merely linking the words "sex" and "books" would not trigger first amendment protections for illegal sexual conduct.\textsuperscript{134} More importantly, the Court determined that because the nonexpressive sexual conduct at issue bore no connection to any expressive activity, it was subject to general state regula-

\textsuperscript{128} Id. at 337, 480 N.E.2d at 1099, 491 N.Y.S.2d at 317. The court of appeals looked to a Virginia case, Commonwealth v. Croatan Books, Inc., 228 Va. 383, 391, 323 S.E.2d 86, 90 (1984) to support its less drastic means approach, noting that it was only after temporary injunctive relief had failed to abate illicit sexual conduct on the premises of an adult bookstore that the Virginia Supreme Court implemented a mandatory one-year closure order. 65 N.Y.2d at 337, 480 N.E. 2d at 1099, 491 N.Y.S.2d at 317. \textbf{But cf.} Commonwealth ex rel. Lewis v. Allouwill Realty Corp., 330 Pa. Super. 32, 41-42, 478 A.2d 1334, 1339 (1984), in which the Pennsylvania Superior Court upheld an order closing two bookstores padlocked for one year due to the repeated occurrence of illegal sexual activities on the premises. Although the superior court recognized that closure might have an incidental effect on the dissemination of protected materials, it nevertheless rejected the defendant's first amendment argument, noting that it was conceivable that the bookstore operator could continue to sell his books elsewhere. \textit{Id.} at 40, 478 A.2d at 1338-39.


\textsuperscript{130} Id. The Court stressed that "bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises." \textit{Id.} This categorization by the majority—"bookselling in an establishment used for prostitution"—suggests that it believed Cloud Books was aware of, and condoned, the illegal behavior occurring on its premises.

\textsuperscript{131} Arcara, 106 S. Ct. at 3178.

\textsuperscript{132} Id. at 3178. As the majority observed, "[t]he crucial distinction between the circumstances presented in \textit{O'Brien} and the circumstances of this case [is that] unlike the symbolic draft card burning in \textit{O'Brien}, the sexual activity carried on in this case manifests absolutely no element of protected expression." \textit{Id.} at 3176-77; \textit{see also supra} note 20 and accompanying text.

\textsuperscript{133} Arcara, 106 S. Ct. at 3178.

\textsuperscript{134} Id. at 3177. The "sex" and "books" rationale can also be found in the Court's obscenity law opinions. \textit{See e.g.}, Miller v. California, 413 U.S. 15, 25 n.7 (1973) ("[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication").
tion. Nor could it be found, in the Court’s view, that New York’s nuisance statute disproportionately burdened bookstores or others engaged in protected first amendment activities.

Addressing Cloud Book’s prior restraint concerns, the majority remained unconvinced that such a danger was imminent, because the bookstore was free to carry on its legitimate selling activities elsewhere. In addition, the Court concluded that the closure proceedings had been initiated without any predetermined intent to prohibit specific books or questionable materials. In her concurring opinion, Justice O’Connor emphasized that had such an intent been present, it would have clearly implicated first amendment concerns and required analysis under the appropriate first amendment standard of review.

In dissent, Justice Blackmun chastised the majority for suggesting that states could restrict speech as much as they pleased, with little or no justification, provided they did so through generally applicable regulations aimed at nonexpressive conduct. Reiterating the long-held principle of testing a

135. Arcara, 106 S. Ct. at 3177-78. This is a critical point of contention between Chief Justice Burger’s majority opinion and Justice Blackmun’s dissenting opinion, as evidenced in their “battle of the footnotes.” In Chief Justice Burger’s view, first amendment analysis under O’Brian is limited to those instances where regulated “nonspeech” activity is “intimately related to expressive conduct protected under the First Amendment.” Id. at 3177 n.3. He cited several cases to support his position, including Grayned v. City of Rockford, 408 U.S. 104 (1972) (demonstration results in prosecution under antinoise ordinance) and Marsh v. Alabama, 326 U.S. 501 (1946) (trespass in order to distribute religious materials). 106 S. Ct. 3172, 3177 n.3. In response, Justice Blackmun takes a broader view of O’Brien, stating that “our concern clearly has been to avoid any exercise of governmental power that ‘unduly suppress[es]’ First Amendment interests.” Id. at 3179 n.* (Blackmun, J., dissenting) (quoting Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)) (emphasis in original).


137. See Arcara, 106 S. Ct. at 3177 n.2.

138. Id. But see Note, Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power, 58 N.Y.U. L. REV. 1478, 1506 (1983), in which it is contended that:

the ability to disseminate material from other outlets may be illusory. In a small town, for instance, the operator of a bookstore or theater may have nowhere else to go . . . . In reality, shutting down a bookstore or theater may completely cut off dissemination of the material in a locality, at least temporarily.

Id.

139. Arcara, 106 S. Ct. at 3178 n.4.

140. Id. at 3178 (O’Connor, J., concurring). Concurring in the majority’s view that a first amendment standard of review was erroneously applied by the New York Court of Appeals, Justice O’Connor asserted that “[a]ny other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment.” Id. (O’Connor, J., concurring).

141. Id. at 3178-79 (Blackmun, J., dissenting). Justice Blackmun also took exception with
statute by its operation and effect, Justice Blackmun argued that generally applicable statutes directed at regulating nonexpressive conduct had always been struck down if they "unduly penalized speech, political or otherwise." The dissent did not view the lack of an expressive element in the sexual activity as dispositive in the case because the Court traditionally avoided any exercise of governmental power which unduly suppressed first amendment interests. Though sympathetic to New York's legitimate interest in forbidding sexual acts committed in a public place, the dissent would have required state officials to employ less drastic means, such as arresting the patrons who actually committed the illegal activity. While linking the words "sex" and "books" should not qualify one's illegal conduct for first amendment protection, Justice Blackmun maintained that neither should it totally disqualify first amendment protections for books located near the site of such activity.

The Court's opinion in *Arcara* departs from its earlier decisions in several ways. First, *Near's* operation and effects test receives a restrictive interpre-

the analogy offered by Justice O'Connor in her concurring opinion to support her view that the first amendment cannot prohibit every conceivable speech-inhibiting consequence of a government regulation. *Id.* at 3180 (Blackmun, J., dissenting). According to Justice Blackmun, "[t]he closure of a bookstore can no more be compared to a traffic arrest of a reporter ... than the closure of a church could be compared to the traffic arrest of its clergyman." *Id.* (Blackmun, J., dissenting).

142. *Id.* at 3179 (Blackmun, J., dissenting); *see also* *Near v. Minnesota*, 283 U.S. 697, 708-09 (1931); *supra* notes 28-36 and accompanying text.

143. *Arcara*, 106 S. Ct. at 3179 (Blackmun, J., dissenting); *see also* *Schneider v. State*, 308 U.S. 147, 165 (1939) (discussed *supra* notes 47-51 and accompanying text).

144. *Arcara*, 106 S. Ct. at 3179 n.* (Blackmun, J., dissenting); *see, e.g.*, *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (state regulation forbidding distribution of religious material on premises of company-owned town violates first amendment). Justice Blackmun also noted that, under the majority's approach, a store selling books that induced browsing patrons to commit illegal sexual acts on the premises would be entitled to more protection under the first amendment than a bookstore selling materials having no such effect on the behavior of its patrons. *Arcara*, 106 S. Ct. at 3179 n.* (Blackmun, J., dissenting).


146. *Id.* (Blackmun, J., dissenting).

147. *Id.* (Blackmun, J., dissenting). In Justice Blackmun's view, a one-year mandatory closure had a severe and unnecessary impact on the first amendment rights of booksellers and therefore required the use of more "sensitive tools" to promote the state's interest in eliminating public lewdness. *Id.* (Blackmun, J., dissenting) (citing *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

pretation. Near and its progeny established the principle that the overall operation and effect of a statute must be considered in judging its validity. In Arcara, however, the Court essentially limited its focus to the New York nuisance statute's effect upon the first amendment rights of those who engaged in illicit sexual activity on Cloud Books' premises. Astonishingly, the Court devoted little attention to the closure order's effect upon Cloud Books' constitutionally protected bookselling activities. Implicit in the Court's approach is the suggestion that such considerations were of secondary importance, due to the nature of the illegal activities that occurred on the bookstore's premises.

Perhaps this result is due to the unusual nature of the facts in Arcara. Three separate parties were involved: the persons committing acts of prostitution and lewdness; Cloud Books, as operator of the premises being closed; and the State of New York, seeking through its police powers, to promote the general public's health, safety, and welfare. Under O'Brien case law, only two parties were involved; the state, and a person or persons involved in some form of illegal activity containing an expressive element. For example, in O'Brien, the government prosecuted an individual who had illegally burned his draft card as a symbolic protest against the Vietnam War. In Schneider, local government officials charged an individual with violation of an anti-littering ordinance because he had distributed leaflets on a public street. In Clark, demonstrators seeking to protest the plight of the homeless were denied a permit by National Park Service officials to sleep overnight in federal parks because it violated applicable government

149. The majority reduced specific consideration of Near's principles to a single footnote, Arcara, 106 S. Ct. at 3177 n.2, and the passing observation that, because "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities," respondent could not complain that its bookselling activities were adversely affected by the statutory closure remedy. Id. at 3177.

150. Id. at 3176-77.

151. Id. at 3177. Chief Justice Burger characterized as "dubious at best" Cloud Books' claim that the effect of New York's statutory closure was to impermissibly burden its first amendment protected bookselling activities. Id.

152. Throughout his opinion, Chief Justice Burger refers to the factual situation as one involving "bookselling in an establishment used for prostitution." Id. 3178 (emphasis added); see also id. at 3173. This suggests that the Chief Justice perceived Cloud Books as being first and foremost an establishment designed to promote illicit sexual activities, with bookselling being merely a "front" to retain legitimacy. See supra note 130 and accompanying text. Clearly, Chief Justice Burger was not about to establish a dangerous precedent by ruling in favor of Cloud Books, no doubt envisioning every pimp and prostitute relocating to the back rooms of bookstores and moviehouses were he to do so.


155. 308 U.S. 146, 158-59 (1939) (discussed supra notes 47-51 and accompanying text).
First Amendment regulations. In all three instances, speech and nonspeech elements were wrapped up in the same individual's illegal conduct. In *Arcara*, however, the speech adversely affected (bookselling activities of Cloud Books) and the nonspeech which drew the closure penalty of New York's nuisance statute (illegal acts of prostitution and lewdness committed on Cloud Books' premises) were not present in the same individual's conduct. Instead of examining how New York's closure provision stopped the legitimate sale of constitutionally protected books, the Court limited its inquiry to whether the illicit sexual activity manifested any element of expression worth protecting from state regulation under the first amendment. As a result, the Court easily justified the New York closure order.

The Court in *Arcara* also held that first amendment review of New York's health regulation should never have been conducted in the first place. In a critical qualification to the applicability of *O'Brien*’s four-part test, the Court stressed that such analysis is triggered properly only where a statute regulates nonexpressive activity intimately related to expressive conduct protected under the first amendment. Absent this nexus, the *Arcara* decision suggested that courts need not concern themselves with any other side effect a statute may have upon protected expression.

*Arcara* also represented a further assault by the Court upon the applicability of *Shelton*’s least drastic means rationale. Continuing the line of thought previously advanced in *Albertini*, the majority stated that government officials are not always required to adopt alternative means to enforce a regulation that has infringed upon protected forms of expression. The Court reasoned that regardless of the form taken, every civil or criminal penalty adopted to enforce a statute will affect some first amendment rights of those subject to its sanctions. As a result, the Court in *Arcara* chose not to place the burden upon New York to find the least restrictive means available to eradicate acts of prostitution and lewdness found on premises engaged in legitimate bookselling activities. Instead, the Court placed the

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158. *Id.*
159. *Id.* at 3177 n.3.
160. *See supra* note 74 and accompanying text.
161. *See supra* note 108 and accompanying text.
162. *Arcara*, 106 S. Ct. at 3177.
163. *Id.*
164. On remand, the New York Court of Appeals refused to follow the Supreme Court's decision. *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 559, 503 N.E.2d 492, 495, 510 N.Y.S.2d 844, 847 (1986). The court held instead that, under New York's constitution, the state must "prove that in seeking to close [Cloud Books] it has chosen a course no broader than necessary to accomplish it purpose." *Id.*, 503 N.E.2d at 495, 510 N.Y.S.2d at
burden on the owners of Cloud Books to find another place to conduct its bookselling activities.

Borderline areas of protected speech, found in adult bookstores and moviehouses, are especially at risk under the Court’s analysis.\textsuperscript{165} Previously, under \textit{Freedman}’s analysis, a state could only ban films or books that had been determined to be obscene through constitutionally acceptable procedures.\textsuperscript{166} New York’s statute did not incorporate any such guidelines into its regulatory scheme. The Court, however, did not find the absence of such safeguards sufficient to trigger analysis under \textit{Freedman} because the statute was aimed at banning illegal conduct rather than the content of the materials sold at Cloud Books. Such a conclusion also must be attributed to the Court’s narrow reading of \textit{Near}, because its decision allows New York to achieve indirectly through nuisance law that which it might not be able to achieve directly through obscenity statutes—the banning of “undesirable” forms of protected speech.

The Court’s decision in \textit{Arcara} also clarified the point at which the burden of a state regulation upon protected expression becomes so incidental that it is easily outweighed by state interests. Chief Justice Burger, speaking for the majority,\textsuperscript{167} and Justice O’Connor, in her concurrence,\textsuperscript{168} determined that this point is reached when the regulated conduct manifests no expressive element of its own, nor is closely connected to any other expressive activity. In his dissent, Justice Blackmun countered that a regulation’s burden upon first amendment rights can only be described as “attenuated” after the state has shown that it has employed the least restrictive means of pursuing its object.

\textsuperscript{847} The court, therefore, denied the order closing Cloud Books for one year because New York officials failed to demonstrate that less drastic means were employed to abate the illicit sexual activity. \textit{Id.}, 503 N.E.2d at 495, 510 N.Y.S.2d at 847. A closure order would have been justified had New York arrested the offenders or sought injunctive relief, and failed in these efforts to abate the nuisance. \textit{Id.}, 503 N.E.2d at 495, 510 N.Y.S.2d at 847. The court stressed that:

The crucial factor in determining whether State action affects freedom of expression is the impact of the action on the protected activity and not the nature of the activity which prompted the government to act. The test, in traditional terms, is not who is aimed at but who is hit.

\textit{Id.}, 503 N.E.2d at 495, 510 N.Y.S.2d at 847. The court based its ruling on the traditionally broader protections afforded freedom of expression under New York’s constitution, stating that “the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State’s constitutional guarantee of freedom of expression.” \textit{Id.} at 557-58, 503 N.E.2d at 494-95, 510 N.Y.S.2d 846-47.

\textsuperscript{165} \textit{Arcara}, 106 S. Ct. at 3180 (Blackmun, J., dissenting).
\textsuperscript{166} 380 U.S. 51, 58 (1965) (discussed \textit{supra} notes 37-46 and accompanying text); \textit{see also} Marcus v. Search Warrant, 367 U.S. 717, 731-33 (1961).
\textsuperscript{167} \textit{Arcara}, 106 S. Ct. at 3172.
\textsuperscript{168} \textit{Id.} at 3178 (O’Connor, J., concurring).
legitimate objectives.\textsuperscript{169} Since the majority in \textit{Arcara} did not require New York to make such a showing, the point at which Cloud Books' first amendment rights could be thought of as incidentally burdened was reached much sooner than it would have under the dissent's standard. This indicates a loosening of the standard traditionally used by the Court to determine whether a state regulation has more than just a minimal effect upon first amendment rights.

By overemphasizing the illegal sexual conduct in this case, and downplaying the constitutional implications of closing a bookstore, the Court is signaling state and local authorities that a broader application of their police powers, at the expense of individual rights, will not necessarily be invalid. By upholding the closure of Cloud Books for one year, the Court unduly encouraged state and local officials to abandon legitimate attempts at abating public nuisances by the least restrictive means available to them. As a result of this decision, a bookstore will be shut down for one year, while those who engaged in the illicit sexual conduct that drew the closure penalty move on to "obscener pastures."

\section*{IV. Conclusion}

In \textit{Arcara v. Cloud Books, Inc.}, the Supreme Court held that the first amendment did not bar enforcement of a statute authorizing closure of premises found to be used as a place for prostitution and lewdness simply because the premises were also used as an adult bookstore. It further held that \textit{United States v. O'Brien} had no relevance to a statute directed at imposing sanctions on nonexpressive activity. Merely linking the words "sex" and "books" will not confer first amendment protection on otherwise illegal nonexpressive conduct.

As a result of its decision, the Court makes clear that it will not allow the first amendment to be used as a device to foster illegal conduct and escape valid state regulations. Yet by adopting this posture, the Court also discards the procedural and substantive protections normally associated with first amendment practices such as bookselling. It has now become easier for governing officials to demonstrate that state interests promoted by a regulation far outweigh any incidental effects the regulation may have on protected forms of expression. As a result, the states are free to adopt a more vigorous use of their police powers, especially as it relates to borderline areas of protected expression like adult bookstores and moviehouses.

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\textsuperscript{169} \textit{Id.} at 3180 (Blackmun, J., dissenting).